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No. 94-116

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

School City of Mishawaka,
Petitioner,

v.

Family & Children's Center, Inc.,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF INDIANA SCHOOL BOARDS ASSOCIATION AND INDIANA ASSOCIATION OF PUBLIC SCHOOL SUPERINTENDENTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This brief is filed with the consent of both parties. Letters of consent are on file with the Clerk of this Court.

INTEREST OF THE *AMICI*

Amicus Indiana School Boards Association (ISBA) is a nonprofit association organized for the purposes of: (1) instructing school board members as to their roles and responsibilities as members of the boards of school trustees of the public school corporations in the State of Indiana; and (2) instructing the public on education-related subjects in order to improve public school education in the state. ISBA's membership consists of 289 of the 293 boards of school trustees in Indiana.

Amicus Indiana Association of Public School Superintendents (IAPSS) is a nonprofit association with membership that includes 281 of the 293 superintendents of public school corporations in the state. One of the stated purposes of the IAPSS is to serve as an agent for the superintendency to help influence significant decisions pertaining to the education of all school children in the state.

Both associations are very familiar with the federal laws to which public school corporations are subject and inform their members of the mandates of such laws. As representatives of the public school corporations in the State of Indiana, the interest of the associations, as *amici*, in this case is the proper administration of the procedural safeguards set forth in the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. All public school corporations in Indiana are subject to the Act and therefore must ensure that proper procedural safeguards are afforded to appropriate persons. The decision of the Seventh Circuit significantly broadens who has the right to access the procedural safeguards set forth at 20 U.S.C. §1415. Because this decision substantially affects public school corporations, both administratively and financially, *amici* respectfully submit this brief.

REASONS FOR GRANTING THE WRIT

IDEA is a federal law that governs the education of all disabled students in this country. Every public school corporation in this nation that receives federal funds is subject to this Act. IDEA mandates that school corporations provide procedural safeguards to parties that disagree as to the free appropriate education offered to students with disabilities. The Act identifies those parties as the parent, guardian, or surrogate parent of the disabled student. 20 U.S.C. §1415. However, the Seventh Circuit in this case concluded that a third party, specifically, a private child care facility, had standing under 20 U.S.C. §1415 to sue a public school corporation for the alleged denial of a free appropriate public education to a group of disabled students served by the facility. The facility is not a parent, guardian, or surrogate parent. This conclusion is contrary to other court opinions and directives from the United States Department of Education on the procedural safeguards required by IDEA.

The court of appeals arrived at this incorrect conclusion by misinterpreting the Indiana administrative regulations which implement IDEA, 511 IAC 7-3 through 7-16. The court wrongly interpreted 511 IAC 7-15-4 as the regulation enacted to implement §1415 of IDEA. Since 511 IAC 7-15-4 allows any individual to file a *complaint*, the court concluded that any individual, not just the parent, guardian, or surrogate parent had standing to initiate a cause of action to challenge an alleged denial of a free appropriate public education to disabled students. This conclusion is in error because 511 IAC 7-15-4 was not enacted pursuant to 20 U.S.C. §1415. It was enacted pursuant to the Education Division General Administrative Regulations (EDGAR), 34 CFR §§76.780-83. The court should have focused on 511 IAC 7-15-5 which was enacted to implement 20 U.S.C. §1415 and limits the right to a due process *hearing* to a parent, guardian, or surrogate parent.

As stated above, the decision of the Seventh Circuit is erroneous and significantly impacts public school corporations in this state. School corporations must be given a correct interpretation of who has the right to initiate a cause of action in accordance with §1415 of the Act.

ARGUMENT

I. The decision of the Seventh Circuit totally violates one of the stated purposes of the Individuals with Disabilities Education Act - to assure that the rights of children with disabilities and their parents or guardians are protected.

IDEA is one of several federal laws enacted to protect disabled individuals from discriminatory treatment. And yet it has a unique purpose. For instance, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, was designed to eliminate discrimination on the basis of a disability in any program or activity receiving federal funds. Its regulations require public school corporations to provide an educational program designed to meet the needs of the disabled student as adequately as the needs of the nondisabled student. 34 CFR §104.33(b). IDEA was enacted to ensure that all children with disabilities have available to them a free appropriate public education. Its regulations set forth very specific procedures for school corporations to follow to ensure the provision of the mandated free appropriate public education to disabled students. As an example, IDEA mandates how students are to be evaluated for special education services, how educational placement decisions are to be made, how disabled students may be disciplined, and how parents are to be involved in the process of delivering an appropriate education to disabled students.

In addition to meeting the educational needs of students with disabilities, IDEA was designed to protect the rights of the student with disabilities *as well as* the rights of the parent of the disabled child. IDEA's purpose, as stated in the Act, is:

> to assure that all children with disabilities have available to them ... a free appropriate public education ..., to assure that the *rights of children with disabilities and their parents or guardians are protected*, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

20 U.S.C. §1400(c)(emphasis added).

Thus, parents are afforded certain rights under IDEA. For example, before a student may be evaluated for a suspected disability, the parent must consent to the initial evaluation. 34 CFR §300.504(b). Before the school corporation can deliver special education services, the parent of the student must be invited to participate in the development of the special education program. 34 CFR §300.345. The parent has the right to access all records maintained by the school corporation relating to his or her child. 34 CFR §300.502. The parent of the child must consent to the proposed placement before the school corporation can begin providing services. 34 CFR §300.504(b). Should there be a need to change the student's placement, the school corporation must secure the consent of the placement before making the desired changes. 34 CFR §300.504(a). Before the school corporation can expel a disabled student, the school corporation must afford the parent the due process rights set forth in IDEA. 34 CFR §300.504(a).

IDEA's implementing regulations define the parent as:

> a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with Sec. 300.514. The term does not include the State if the child is a ward of the State.

34 CFR §300.13.

This definition is very specific and very narrow. It includes only those persons who have the lawful authority to make decisions regarding a child's education and does not include any other individual who represents to have the best interests of the disabled child in mind. It does not include any other third party. Thus, it is only the parent, as defined above, and not any other individual, that has rights under IDEA.

The Act is just as specific in its dictates regarding procedural safeguards. The Act requires school corporations to establish procedures to:

> assure that *children with disabilities and their parents or guardians* are guaranteed procedural safeguards with respect to the provision of a free appropriate public education ... .

20 U.S.C. §1415(a)(emphasis added).

The IDEA regulation which implements §1415 allows only a parent or a public educational agency to initiate a hearing regarding the identification, evaluation, or educational placement or the provision of a free appropriate public education to the child with disabilities. 34 CFR §300.506(a). It does not allow a third party to initiate a hearing.

Thus, it is only the student and the student's parent who has the right to initiate a cause of action under §1415. *It is only the children with disabilities and their parents or guardians whose rights are protected under IDEA.* The court of appeals' decision to allow a third party the right to the procedural safeguards mandated in §1415 totally violates the stated purpose of IDEA.

The impact of the court of appeals' decision on the provision of a free appropriate education to a disabled student is significant. For instance, if a third party is deemed to have standing under §1415, this would allow any individual to interfere with the educational placement decisions made by a school corporation and the parent of the disabled student and effectively halt the provision of a free appropriate public education to the disabled student - the very thing the Act was enacted to do.

The impact of this decision can be illustrated in this manner. The concept of "inclusion" is being promoted for special education students. Generally speaking, inclusion can be defined as providing an educational program to the disabled student in the regular education classroom, with support services being brought into that classroom as opposed to the disabled student leaving the classroom for the special services. The concept of inclusion has also been addressed by the courts. Recently two circuit courts of appeal analyzed the mandate of IDEA to provide educational services to the disabled student in the least restrictive environment and concluded that the school corporations failed to meet this obligation because they had not demonstrated that the disabled students in question could not be educated in the regular education classroom. See *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994) and *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3rd Cir. 1993). In both of these cases, the students involved were severely disabled, and one student demonstrated serious behavior problems. Despite their specialized needs, both courts held that the school corporations did not meet their burden of proving that the least restrictive

environment for these students was not the regular education classroom with supplementary services being provided in the classroom.

Indiana is also subject to the IDEA mandate of educating disabled students in the least restrictive environment and is funding pilot studies on inclusion in several school corporations. As a result, many more students with disabilities are being educated in the regular classroom. Now, in Indiana, in light of the Seventh Circuit's decision, any individual can access the state's due process provisions and object to the placement of disabled students in the regular education classroom despite the mandate of the federal law and the courts. Should the parent of a severely disabled student and the school corporation agree that the child should be educated in the regular education classroom because that is the least restrictive environment, a parent of a nondisabled student enrolled in the same class as the disabled student can sue the school corporation, asserting that the placement violates IDEA. Once an objection is made and the due process procedures initiated, the disabled student will be forced to remain in a more restrictive placement while the school corporation and the parent defend their placement decision in federal court. The impact of this means that now the disabled student is being denied the free appropriate education guaranteed by IDEA and the rights of the disabled student and the parent of the student are being violated. Clearly, this is contrary to the purpose set forth in IDEA.

In addition to a parent of a nondisabled student having the right to challenge educational placement decisions made for students with disabilities, the holding in the lower court opinion would also give a local teacher's union the same right. This conclusion not only violates the stated purpose of IDEA, but also violates Indiana's collective bargaining law. I.C. 20-7.5-1-1 et. seq.

Indiana's collective bargaining law grants school employers certain management rights. I.C. 20-7.5-1-6(b) clearly sets forth those rights:

> School employers shall have the responsibility and authority to manage and direct in behalf of the public the operations and activities of the school corporation to the full extent authorized by law. Such responsibility and activity shall include but not be limited to the right of the school employer to:
>
> (1) direct the work of its employees;
> (2) establish policy ... ;
> (5) maintain the efficiency of school operations; ... and
> (7) take actions necessary to carry out the mission of the public schools as provided by law.

To allow a local teacher's union to challenge educational placement decisions made by a school corporation and the parent of a disabled student would interfere with these management rights. Again, referring to the inclusion example cited earlier, the school corporation must ensure that the student with disabilities is educated in the least restrictive environment. This may result in the student being educated in a regular education classroom. The regular education classroom teacher may oppose the placement of the disabled child in that class and, with the assistance of the union, may request a due process hearing. Giving a third party, the teacher's union, this right conflicts with the school corporation's right to direct the work of its employees and, more importantly, the right of the school corporation to take those actions which are necessary to comply with federal and state law.

II. The result of the Seventh Circuit's misinterpretation of Indiana's procedural safeguards is the commingling of two separate and distinct avenues of due process, which gives a third party greater procedural safeguards than those intended by IDEA.

As stated earlier, the Seventh Circuit incorrectly concluded that 511 IAC 7-15-4 was promulgated to implement §1415 of IDEA. In actuality, 511 IAC 7-15-4 was promulgated to implement §§76.780-83 of the Education Division General Administrative Regulations (EDGAR). 511 IAC 7-15-5 is the administrative regulation enacted by the Indiana State Board of Education to implement §1415 of IDEA.

The procedural safeguards set forth in IDEA, specifically 20 U.S.C. §1415(b)(1)(E), require the state and local education agency to afford *parents or guardians* an opportunity to present complaints with respect to "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." 511 IAC 7-15-5 implements this section.

On the other hand, EDGAR requires state agencies to adopt complaint procedures for "resolving any complaint that the State or a subgrantee is violating a Federal statute or regulations that apply to a program." 34 CFR §76.780. 511 IAC 7-15-4 implements this regulation.

These are two separate and distinct procedural safeguards with different purposes required by two different federal laws. The court erred in concluding that 511 IAC 7-15-4 was part of the procedural safeguards required by IDEA. IDEA's procedural safeguards are solely for parents and guardians to access when they disagree with a school corporation's decision with respect to the identification, evaluation, educational placement, or provision of a free appropriate public education to a student with disabilities. EDGAR's procedural safeguards are for any

individual to access when the individual believes there has been a violation of any federal law to which the school corporation is subject.

By confusing these two different avenues of due process, the court of appeals, has commingled the two processes. The court of appeals mistakenly concluded that Indiana has invited third parties to access the procedural safeguards required by 20 U.S.C. §1415. Indiana did not do this. The court of appeals, by virtue of this decision, has granted any individual the right to the due process hearing mandates established by Indiana in accordance with 20 U.S.C. §1415, i.e. 511 IAC 7-15-5. The lower court has now granted third parties greater due process rights than those mandated by IDEA, and due process rights that in fact violate the purpose of IDEA.

This means that any individual can, pursuant to 511 IAC 7-15-5, request the appointment of an independent hearing officer to challenge decisions made regarding the identification, evaluation, educational placement, or free appropriate public education of all disabled students served by the school corporation. Previously, third parties were only afforded the opportunity to file complaints alleging violations of federal or state laws that apply to special education programs. Now, by having access to due process hearings, third parties, in preparation for such hearings, will have access to confidential records relating to students with disabilities maintained by the public school corporation. These are not the due process rights intended by IDEA. IDEA intended for only parents or guardians of disabled students to have the right to a due process hearing to challenge whether or not their students were receiving a free appropriate public education, not any other individuals or third parties. EDGAR intended to allow any individual the right to file complaints alleging a violation of any federal law, including IDEA. As a result of the lower court's decision, a third party can now access both avenues of due process, giving third parties greater procedural rights than established in IDEA.

III. The decision of the Seventh Circuit significantly burdens public school corporations.

In addition to granting due process hearing rights to any individual, the Seventh Circuit appears to be saying that any individual can file a complaint with the state department of education in accordance with 511 IAC 7-15-4, and after exhausting those administrative remedies, can assert jurisdiction under §1415 and file a petition in federal district court. The conclusion of the lower court obviously increases the number of parties who can allege violations of IDEA. This result significantly burdens public school corporations.

More and more school corporations are faced with due process hearings regarding educational services provided to students with disabilities. School officials, including teachers, psychologists, therapists, nurses, and administrators, must spend a significant amount of time preparing for the defense of all decisions made regarding a disabled student's education program. At any time during the process of determining and providing a free appropriate public education, a parent can object and request a due process hearing. For example, a parent could disagree with the results of the evaluation of the existence of a disability, the nature of the regular and/or special education services that will be provided, the placement in which the services will be provided, and whether the student's placement should be changed. To now allow other individuals, not just the parent or guardian of the disabled student, jurisdiction to challenge each one of these decisions will significantly impact school corporations.

While this is a significant administrative burden on school corporations, it also is a substantial financial burden. School corporations must expend limited resources in preparing for hearings and defending their actions during hearings. School corporations must incur these expenses whether or not the allegations have any merit. Additionally, as mandated by IDEA,

school corporations must pay the attorney fees of the challenging party, if that party prevails. 20 U.S.C. §1415(e)(4). This obviously increases the costs associated with due process hearings, and will severely impact school corporations' budgets if persons other than parents or guardians are determined to be prevailing parties.

CONCLUSION

The holding below is a significant departure from other court decisions on this issue and is in error. For the reasons stated above, *amici* urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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